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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, APPELLANT,
v.
THE OFFICERS AND CREW OF THE U. S. steamer "Mangrove." } No. 24.

THE OFFICERS AND ENLISTED MEN OF THE U. S. ship "New York" and others, appellants,
v.
THE OFFICERS AND CREW OF THE U. S. steamer "Mangrove." } No. 34.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

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ARGUMENT.

I.

The first proposition for which the United States contends is that the *Mangrove* was superior in force to the *Panama*. The former was a steel screw steamer of 500 tons burden, a light-house tender, transferred from the Treasury service to the Navy for the Spanish war. She carried two 6-pounder guns, and had on board,

besides her commander, two other officers of the Navy, two noncommissioned mates, and the usual complement—in all a crew of 30 men. Her speed was about 8 knots. It seems she carried no small arms nor cutlasses, owing to delay in filling the requisition. Lieutenant Dayton, the boarding officer from the *Mangrove*, Commander Todd and Ensign Bailey, of the *Wilmington*, Ensign Mustin, of the *New York*, and Commander Winn (retired), prize commissioner, unite in the belief that the *Mangrove* was inferior in force. Captain Taylor perhaps intimates the same view.

The description of the *Panama* and her armament appears in the record, and is particularly stated in the opinion of this court upon condemnation (176 U. S., 535). She was of 1,432 tons register, carried a crew of 71 all told, had on board mounted two breech-loading guns of 9 centimeter bore ["for firing a projectile weighing about 14 pounds"] (Dayton, add. ev., p. 143); 1 Maxim rapid-firing gun on the bridge, 20 Remington and 10 Mauser rifles with ammunition for all the guns and rifles, and 30 or 40 cutlasses. That opinion condemned the vessel as "enemy property, bound for an enemy port, carrying an armament suceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes." The best speed of the *Panama* was about 12 knots. Lieutenant Dayton, in taking her to Key West, ran her at less speed to keep in company of the *Mangrove*, and did not know from actual trial that she could make 12 knots. The record

contains little additional information. Murray, the Indiana yeoman temporarily on the *Mangrove* (add. ev., p. 90), says that Dayton, after reaching the prize, informed Commander Everett by megaphone that he had noticed two guns on the forecastle covered by canvas; that he did not know whether they were defective or complete; that he had assured the captain that the *Mangrove* would not fire into him and endanger the lives of his passengers. Everett, just before, had informed the captain, through Dayton, that if he deviated from the course set, or tried to get away, the *Mangrove* would fire into him. Dayton says (pp. 144–147) that he had only looked casually at the *Panama's* guns; that they were not loaded; that the breechblocks were not on; that he was told they were stowed away below; that he supposes the ammunition was also below, although he heard afterwards that the ammunition for the Maxim was kept on the bridge; that he has no knowledge that the guns were fit for use; that, however, the breechblocks or plugs could have been brought up quickly from below and the guns made ready for use in a few minutes by experienced men. One of the *Mangrove's* witnesses, C. Peterson (add. ev., pp. 158–159), testifies that he saw a sailor of the *Panama* taking a tarpaulin off one of her guns, but he was stopped by an officer in uniform. Another witness for the *Mangrove*, Cosgrove (Id., p.171), testifies to the same effect.

The United States has endeavored to locate some of the officers of the prize to obtain further testimony on

the condition of her armament and rate of speed, but without success.

On the foregoing facts it might be asserted that if the *Mangrove* and the *Panama* are to be regarded as two units on the high seas unrelated to other vessels and to all the attendant circumstances, the strength of the *Panama* was equal or superior; but the surrounding facts are an essential part of the problem. In the first place, the opinion in the condemnation case considered the force of the *Panama* as potential rather than actual; as placing her in the category of enemy merchant vessels, not covered by the executive exemption, rather than in the class of combatants. Under her postal relations and her contract attaching her to the Spanish naval reserve, she was armed first for defense in time of peace against all the remote contingencies which mail carriers must regard—against such contingencies at any time, doubtless—but not for flagrant resistance to a recognized belligerent. She was armed to protect her mail service against wanton or unauthorized stoppages and searches if there should be disturbances or lawlessness along her route, rather than to resist legitimate arrest by a declared enemy of her own flag. The opinion considers the armament as susceptible of hostile use chiefly because of Spain's right to impress the vessel if she reached Havana. She might then be strengthened and sent out as a cruiser, and in view of the contract relation her merchant character did not require us to place a hostile instrument in the enemy's hands. The court

views her armament in the light of her intent in hastening to her country's port and of the purpose to be subserved on arrival there, and not as an effective hostile instrument at the time of capture. She was after all a merchant vessel and presumably peaceful in disposition toward any legitimate vessel of war until her merchant character should be changed upon appropriation by Spain at Havana. The modification of the merchant character by her postal armament justified condemnation, but did not turn her into a unit of fighting force while pursuing her merchant voyage. Thus it was because the armament was not only for defense in the postal service, but was susceptible of positive hostile use if Spain obtained possession, that the vessel was condemned. She was "intended in the event of war to be used as a war vessel," as the court says, but not until Spain had appropriated her.

In the next place, when the *Panama* left New York on April 20, 1898, her owners and officers knew very well that war was imminent; the public tension, the preparation for the event which occurred, the assembling of our vessels of war in Cuban waters, were notorious facts; it was manifestly the eve of war and blockade. The *Panama* necessarily desired and endeavored to make for her port of refuge as straight and as fast as she could. She naturally sought to evade discovery and elude arrest. That the exact situation and the risks were in the minds of her officers is shown by the testimony of Reyan. (Tr., p. 17.) Evidently she proceeded fearfully and as secretly and rapidly as

possible. No intention whatever to use her armament and fight appears anywhere. The substantially uniform statement is that there was no resistance, although one or two witnesses expressed the suspicion that the *Panama* at one point intended to ram the *Mangrove*. There is no testimony showing that the *Panama* sought to escape before or after capture or swerved from her straight course at all times for Havana. On April 22 the blockade of the north Cuban coast east and west of Havana was proclaimed, and the blockade as an actual fact already anticipated and provided for was duly established. On April 25, the date of capture, Congress declared that war existed on and after April 21. On April 26 the President, recognizing this declaration, proclaimed adherence to the modern rules respecting neutrals and blockade, and extended to merchant vessels and mail steamers certain exemptions from capture and condemnation, which were held by this court not to protect the *Panama*.

The war vessels off the Cuban coast were waiting and watching for the *Panama*. She was well known, her voyages were regular, and they were expecting her. Captain Chadwick says (add. ev., p. 103), "I think everybody was on the lookout for her."

This, then, is the situation: Our war vessels are hovering off the Cuban coast on their blockading beats about Havana and to the east and west of that port. They are stationed generally from 7 to 20 miles from the coast line in that vicinity. Some of the vessels here involved, with others, are about to be detached for

a cable-cutting expedition elsewhere, but have not yet received their final orders. Among their other duties of watch and ward, they are specifically expecting this merchantman to appear on her regular trip. She, proceeding straight for the harbor mouth in a generally southwest direction, after rounding Florida, and without changing her course as the capturing vessels appeared (see testimony *in preparatorio*, Tr., pp. 9, 12, 16), by paramount necessity runs deliberately into the jaws of the squadron and is peacefully intercepted and brought to, knowing that her only hope of safety is dissipated. That hope was to steal into Havana unobserved, availing of some fortunate chance. To go elsewhere at any point after leaving New York was practically impossible, her consignments and engagements being what they were and her sailing being known; at least the risk of the Havana destination was fairly debatable on the many chances of delay in the actual declaration of war, and that risk was taken rather than the similar risk and certain loss of secret flight to some distant and unexpected destination. So her only part was to run straight for Havana and take her chances. When she came to this group of war ships she instantly acquiesced in her fate, as doubtless she had intended to do from the beginning if her chances failed. She did not resist, in fact; she never intended to resist: Her armament was in all senses, literal and figurative, out of commission for the emergency which confronted her when she was sighted, intercepted, and rounded up by the vanguard of the

forces of the United States, engaged, as she then well knew, in open war against her nation. When she saw the national flag and character of the *Mangrove*, she perfectly knew the hostile status and purpose, and it did not need the shot and challenge to make her larger size and stronger potential armament powerless. She knew the *Mangrove* was a war ship, as the testimony *in preparatorio* states, and did not speculate on the difference in size, speed, and armament. The *Mangrove* only changed her course slightly to meet or intercept the *Panama;* there was no "chase" in reality. Nor would the *Panama*, as the event proved, take the risk of calling on her slightly greater speed against the *Mangrove's* guns. She had passengers, mails, and property to save. Irrespective of the other war ships (which, in fact, she saw; see testimony *in preparatorio*), she was aware that if she dared to engage the *Mangrove* within 25 miles of Havana, even though there was no ship in sight, and even if she escaped from the *Mangrove* she invited almost certain doom. The noise and duration of a fight would probably bring help from the squadron which she justly suspected was somewhere across her path over the remaining distance to Havana. She would rightly believe that in other directions there was a cordon around her and many chances against her. If such a fight had been undertaken, when probable retribution came passengers and lading might not prevent stern punishment for such unheard-of temerity. Her crew were the ordinary men of a merchantman, not articled to fight, not

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skilled in the handling of guns. The *Mangrove* was officered from the regular service and manned from that service, and from the Light-House Service, also superior to merchant service in efficient training and discipline for hostilities. Her regular character and efficiency the *Panama* would divine at a glance.

But the other war ships were in fact seen by the *Panama*, emphasizing in the minds of her officers some such train of reflection as the above, and leading them, if they had ever paltered with the temptation to fight or run, to leave the guns covered and dismantled and the ammunition and small arms undisturbed below.

On the facts proved or admitted, or within judicial cognizance, and on irresistible inferences of the reasoning of the *Panama's* officers as they foresaw and faced their dilemma, it seems to me impossible to contend that she was equal or superior in force. Her officers' reasoning issued in their handling their vessel as a peaceful merchantman only, ignoring the summons to stop until, by its imperative repetition, they realized that the chance of running for it to Havana was gone. Even this concession is against the master's deposition that he stopped his ship after the first shot—meaning, of course, before the second. The *Mangrove* merely headed her in, so to speak, toward a result predestined from her course to Havana and her character as merchantman among warships blocking the end of her journey to safety; and the *Mangrove*, being nearest, simply intercepted her first, while one of the other vessels was hurrying up for active cooperation if

necessary. All the attendant circumstances—the known imminence of war, the assembling of our squadrons, the high probability of blockade and hostile cruising, the flag of the United States at her peak, and the warlike trim of the *Mangrove*, the sight of the *Indiana* and *Wilmington* between themselves and Cuba—had the effect of reducing the nominal force of the prize to practically nothing in reality and by comparison. It was at the critical moment, simple merchantman, unarmed for such work, as against "a dog of war," however small its size. Their postal armament was not uncovered; the ammunition and small arms remained below; they never dreamed of resistance or flight if they could not slip through unobserved to Havana. If this is not so, why did they not either fight or run away on the theory of superior force, heavier armament, or greater speed?

The notion and consequences of relative force—inferior, equal, or superior—grew up in early days when there were many privateers as well as King's ships on each side, and fights were frequent. Greater reward was properly given for great gallantry with small relative force, meaning actual and intended fighting force. I think no one in those days would have dreamed of invoking this principle to settle the case of a merchant vessel armed only against "assailing thieves," but now facing several hostile cruisers. I am sure no reported case can be found which furnishes any precedent.

The statement in the *Atlanta* (2 Spr., 251) that the court will consider the means the prize possessed and

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not the use she made of them surely is not applicable, for there all the vessels captured and capturing were war vessels. The Confederate cruiser *Atlanta* had gone out to seek and challenge the Union monitors, and in the resulting pitched battle was overcome so quickly by one of her opponents that she was forced to strike before she could bring all her heavy batteries into action, as she desired and intended to do. It was of this entirely dissimilar situation that the remark stated was made.

Even if the *Mangrove's* theory of inferior force at the instant of capture be assumed, its effect is immediately avoided by the fact that she steamed straight to her approaching consort and shipped the prize crew which she could not furnish herself. The Government argues that the strict statutory condition of signal distance is met; that the *Panama* was shorn of her force by the visible presence of the other ships, and by all the attendant circumstances surrounding her voyage and destination; that one at least of the other war ships, possessing guns of effective weight and range, seeing the merchantman and the so-called chase, hurried up in active cooperation. But further, the Government contends that here is no vague constructive joint capture, no mere general association in a blockade or expedition, but immediate and real aid. On the *Mangrove's* own assertion of her weakness the capture was not sure and safe until her threatening bearing had partly deluded and partly coerced the *Panama* into the presence of the *Indiana* and the prize crew had been furnished.

II.

The second position for which the United States argues is that another vessel or other vessels of the Navy were within signal distance of the *Mangrove* at the time of capture, and therefore were joint captors and manifestly reduced the relative force of the prize. This proposition (in relation to the right to participate in distribution) is fully presented by the arguments made on behalf of these vessels, and the United States adopts those arguments as part of its own case. We contend that if other vessels are within signal distance, and therefore entitled to share, this is on the theory that the other vessels are joint captors cooperating or ready to cooperate by reason of their presence in effective condition within the statutory distance, and that the result necessarily is an augmentation of the effective force of the capturing vessel so as to make it superior to the prize even if otherwise it would not be so. This effect of being within signal distance, and therefore entitled to share, upon the question of relative force, will doubtless be denied by all the naval captors. We reserve that point for a later portion of the brief.

Here we commit the contention that other vessels were in fact within signal distance to the arguments on behalf of the *Indiana*, *Wilmington*, and *New York*. Yet it will be well to consider briefly some general principles involved.

Under the British statutes the captors' share of a prize went to the "takers." The elastic development

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of the law out of precedents and by the great admiralty judges construed and enlarged the import of this word. King's ships in sight were entitled to share, but not privateers without some actual cooperation, because in the one case there was always a presumption of an intent to engage if necessary; in the other case, not so. "The officers commanding His Majesty's ships have at all times the *animus capiendi*." (*The Galen*, 2 Dod., 19, 31.) Privateers were free to act as their interests might dictate. Mere sight from the masthead was not sufficient. It was never doubted that active cooperation insured the right to share. The test of being in sight was applied with just liberality. This test made joint capture without actual participation in the engagement or stoppage.

From this liberality was developed the constructive and more remote joint capture which admitted to share all vessels engaged in the same general object, as blockade or expedition, even if not really within sight. This extension of this principle was afterwards somewhat restrained. But the general doctrine of numbering among the takers as joint captors those who contributed to the intimidation of an enemy or the encouragement of a friend is well established. For instance, in the *Drie Gebroeders* (5 C. Rob, 339) a privateer was the actual captor, and a meritorious one, as the object was not effected without considerable exertion. The King's ship was in sight, but merely watching in readiness to give aid if there were resistance. There was no resistance, because it was "deemed

hopeless from a view of the assistance which was to be expected from the cutter." And the King's ship was given an interest because of the general presumptions of law in her favor.

In the case of the *Sparkler* (1 Dod., 359), Sir William Scott states the rule thus:

> The rule of law upon this subject is that a ship in sight at the time of capture is entitled to share in the prize from that circumstance alone, unless the case happens to fall within one of the exceptions to that general rule; such as the circumstance of steering a directly contrary course, for that might defeat an interest which would otherwise have been supported upon the ground of being in sight. It may seem hard upon the actual captor that a vessel which was perhaps scarcely in sight, and contributed nothing to the capture, should be entitled to an equal share of the benefit with another ship which may perhaps have been engaged in a long pursuit of the prize, and may likewise have sustained a very severe conflict. Where exertions of this kind have been made by the actual captor, and no assistance has been afforded by the vessel claiming to share as joint captor, the case may very properly be called an extreme one. But according to the statement contained in the allegation, there was in this case an actual contribution of assistance on the part of the *Armide*, for that ship is asserted to have joined in the pursuit with the *Nimrod*. Such a claim is not to be described as an extreme one, or as one which the court

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> would strain hard to reject; it is rather entitled to be considered in a favorable point of view. For the law is willing to favor the interests of all who contribute their endeavors to capture the vessels of the enemy.

This is a typical statement of the proper distinctions in such a situation. It is fully applicable to the facts of the case in hand, and, as I shall endeavor to show, the principle which Sir William Scott invoked upon this subject, when not extended to those who are at a distance and merely associated in the general purpose of the operations, is justly to be invoked under the language of our own statute. It is reasonable that those whose presence and cooperation manifestly contributed to the result, because their support aided in intimidating the enemy and encouraging the friend should be admitted to share, and the learned judge in his reiteration of that doctrine states and enforces the rule of justice on the subject. He rendered many judgments to the same effect. (See cases cited in Story's Principles and Practice of Prize Courts, and in other authorities, *infra*.)

An instance of the extreme length to which constructive assistance is carried is seen in the case of the *Forsigheid* (3 C. Rob., 311), in which the fleet was admitted to share, although the capture was made out of sight and without any concurrence in chasing. The captured ships were not seen by the fleet until they were in the possession of the actual captor. I quote a part of the judgment, as it illustrates the

development of the subject in the learned judge's mind:

> Undoubtedly different principles apply in cases where ships are associated by public authority on a common service, and where they are not so associated together. * * * It is essentially necessary in such cases [that is, where "not so associated together"] that the party should have been in sight at some part of the transaction, though it is not required that it should be at the moment of capture, because the impulse and impression on the mind of the enemy who is to be intimidated, or of the friend who is to be encouraged, may remain, notwithstanding the intervention of a headland or fog, and may therefore bring it within reach of that principle of law on which constructive assistance is built. But in cases of ships associated together by public authority the same principle does not necessarily apply. * * * The fleet so associated is considered as one body unless detached by orders or entirely separated by accident, and what is done by one, continuing to compose in fact a part of that fleet, enures to the benefit of all.

And on this principle the fleet was given an interest in the prize.

In the *Harmonie* (3 C. Rob., 319) a statement was made which illustrates a feature of the present case. There, it is true, there was an actual order to bring all prizes up to the squadron. There was an inner tier of smaller ships on a blockade, and this service was alleged to be separate, so as to give the actual captor

near the shore an exclusive right. But it was naturally held that this was not a distinct employment, the court remarking:

> Of course ships attempting to break the blockade *ab extra* would fall first into the hands of the large vessels; those that attempted to violate the blockade by egress would be intercepted by the smaller ones within. Directions were given to them to bring all such vessels breaking the blockade up to the fleet. Until that was done it was not properly a capture, but detention.

Here the circumstances create a situation amounting to such directions, for the *Mangrove* was not able to handle her prize without thus driving her up to the squadron and reporting in order to obtain a prize crew.

In *La Melanie* (2 Dod., 122), the court said:

> There can be no doubt that sight alone is between King's ships generally sufficient to establish a claim of joint capture. By sight I understand the being seen by the prize as well as by the captor, and thereby causing intimidation to the enemy and encouragement to the friend. I am not aware that one of these will aid without the other. But sight, even if proved in the fullest and most satisfactory manner, does not universally give a right to share.

The court then states circumstances which rebut the presumption arising from sight, as, for instance, when the ships are lying in a harbor, unable to get out, or where, being at sea and having it in their power to render assistance, they are unconscious of what is

going on and are pursuing a different course. "In such circumstances they can occasion no terror to the enemy nor afford any encouragement to the friend, and therefore they are justly deemed not entitled to a share of the benefit."

It is evident that in the development of the law in England the terms "sight" and "signal distance" were considered as practically interchangeable. For instance, in *Le Bon Aventure* (1 Ac., 211, 238) the use of both terms runs through the final paragraph of the judgment:

> It is obvious that if he had been *within signal distance*, he might easily have been checked. * * * We can not absolutely say the *Albion* was not *within signal distance.* * * * A third reason has been lately urged * * * that of association throughout the whole transaction * * * comprising both chases, since it commenced *within sight* of the fleet * * *. Upon this principle * * * it is necessary to inquire * * * whether a vessel commencing a second chase *in sight* of a fleet, etc.

If there was any "chase" here in the ordinary sense, the *Indiana* certainly took part in it. The English doctrine on this subject is to be found in *L'Amitie* (6 C. Rob., 261):

> With respect even to privateers the act of chasing, if continued for any length of time, will be sufficient to found a title of joint capture. It will not be necessary that the joint chaser should actually board the prize; it will be enough if there is an *animus persequendi* suffi-

> ciently indicated by the conduct of the vessel, and not discontinued.

In that case the vessel claiming to share "was in chase at the time of capture, and had been in chase before." And so it is in the present case.

The leading case defining captors, constructive captors, and the limit of rights founded on a common enterprise is the *Vryheid*. (2 C. Rob., 216.) In the *Nordstern* (1 Ac., 128), Sir William Grant expressed the doctrine of association as follows:

> Where a capture is strictly made in association, the parties so associated shall be admitted to share. We are now called upon to extend this principle to a very considerable length indeed, and give an extremely vague, constructive meaning to the term association—

which he declines to do.

I have cited the foregoing English cases because, even where not altogether relevant to the present situation, they nevertheless throw light upon the principles involved.

The doctrines and distinctions of the English cases are fully reviewed in Story's Notes on Prize Courts (Pratt's edition, London, 1854, pp. 98–108). Several American cases, to which I shall presently refer, discuss the principles in connection with the language of our statutes. The phrase of the act of 1800 (par. vii, sec. 6, act April 23, 1800, 2 Stat., 45, 53) was "in sight;" that of the act of 1862 was "within signal distance" (act July 17, 1862, 12 Stat., 600, 606, sec. 3, par 4); that of the present law (act June 30, 1864,

sec. 4632, R. S.) is "within signal distance * * * under such circumstances and in such condition as to be able to render effective aid if required." "Signal distance" might be regarded as having a broader meaning than "in sight," because including audible as well as visible signals. On the other hand, assuming it to be restricted to the visual signals of ordinary use, it might be viewed as a stricter phrase than "in sight." Apparently Judge Betts, in the case of the *Anglia*, has this idea in mind, the restrictive notion, when he intimates that the two terms are the same in effect.

> In my opinion the phrase "within signal distance," employed in the act of 1862 in place of the prior expression "within sight," may have been substituted as carrying within it a like import with the antecedent one, with perhaps a stronger significance, that proximity of position in relation to the capturing vessels must be such as to render intercommunication with the different consorts practicable and intelligible. The mere variation of phraseology in a revision or reenactment of statutory law is not regarded as a revocation of the law, unless plainly so expressed.

This view is, I think, correct, and makes proper to cases arising under our own law the application of the English doctrines. (The *Anglia*, Blatchf. Pr. Cas., 566.) In that case the court comments upon the limitation of prize law as to the rights of constructive captors and joint enterprise under the English decisions, and holds that the language of the act of 1862 "affords no indication that the established rules in regard to joint

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captors in prize cases are intended to be changed. * * * It will not be implied constructively that assistance has been rendered by a ship not palpably contributing to the capture of another, unless she was within signal distance of the one making the prize, in circumstances which might have justified the capturing ship in demanding and expecting her assistance and the prize vessel in apprehending her interference." One of the vessels claiming to share was stationed 16 miles distant from the place of capture, and the other one was not proved to have been any nearer to the scene of the transaction. In the present case, at least one of the vessels claiming to share palpably contributed, and was present within signal distance or in sight under circumstances which justified the capturing ship in expecting assistance and the prize in apprehending interference.

Judge Sprague, however, in the *Ella and Anna* (2 Spr., 267), appears to be of the view that the change from sight to signal distance was of consequence. "The change made by substituting signal distance for being in sight by our statute of 1862 is far from being immaterial, and English decisions are not authorities to be implicitly followed." But his test is that the presence of the other vessel should be really effective, for he says:

> Reason and policy dictate that no part of the prize should be taken from those whose vigilance, energy, skill, or courage achieved the capture, to be given to others who contributed no assistance and were so remote as to render it

> very doubtful whether a request for aid could have reached them if aid had been desired.

And again:

> It is a great privilege to any vessel to be allowed to share in a prize which she has not actually aided in capturing. Such indulgence is not to be granted without good reasons. It ought not to be enjoyed by any vessel unless she is within such distance as gives assurance that she would render actual assistance if called upon, and could afford encouragement to the captors by their knowing that such assistance was at hand.

A note to that case (as reported in Federal Cases, No. 4368) states that this construction by the court of the act of 1862, requiring the ability really to cooperate and excluding the general notion of joint enterprize, led to the act of 1864, which expressed that test by the words "under such circumstances and in such condition as to be able to render effective aid if required."

The case of the *Cherokee* (2 Sprague, 235) shows the effort of vessels merely cooperating in the blockade of Charleston Harbor to share as joint captors. They saw the commencement of the chase only; they did not start in pursuit, but remained at their anchorage. The pursuer and pursued were entirely lost sight of, and the capture was effected 35 miles from the blockading squadron. Under these circumstances the court justly denied the right of the squadron to share, applying the restrictions on the doctrine of constructive joint capture. The English decisions are reviewed carefully and

the evolution of the rule traced that a King's ship being in sight was constituted a joint or constructive captor in law. The court finds that the enlargement of the doctrine of constructive capture by association had never been part of our own law, and that the English courts admitted that their decisions had sometimes gone far beyond the just interpretation of the prize grant. The express provision as to signal distance in the act of 1862 is taken by the court as meaning that Congress fixed the limits of constructive joint capture, and excluded the doctrine of an association in a common enterprise. The subject was also considered in the *Ella and Anna* (*supra*) and the same result adjudged under similar circumstances.

We contend that the effect of the foregoing authorities is that "within signal distance" is not essentially a narrower and stricter term than "in sight;" that the English cases, viewing as joint captors those who contribute by their active endeavors or by their near presence to the result, encouraging a friend and intimidating an enemy, are relevant authorities in the present case; that the American cases and our development of statute law simply result in excluding that remote class of constructive joint captures because of association in a common enterprise, whom the English courts themselves came to look on doubtfully as not justly entitled to share; that in this case, in which the enemy saw the other vessels and the actual captor, on the record, either did see them or could have seen them and signaled to them, and in which one at least of the other

vessels not only endeavored to cooperate by going at once in joint pursuit of the prize, but actually did cooperate by coming up with the captor and captured almost immediately after the event, and by furnishing a prize crew—in this case, I say, and under such circumstances it is not to be doubted that another vessel or all the other vessels claiming to share are to be taken as joint captors within the meaning of our own statutes and decisions.

III.

The Government finally contends that participation in the capture and the consequent right to share establishes necessarily the effective superiority of the capturing force. What is the meaning of the recognition of the right of other vessels to share? Is it not that being within proper distance, able, ready, and willing to render aid, they give support to the actual captor, and add their resources to his strength in a comparison of force? It makes no difference whether all are called the capturing force, or the distinction is preserved between the actual captor and the joint captors—in either case the force of the enemy is to be measured against the combined force of those who could have concentrated against him if required. But the captors will argue otherwise: They will point out that section 4630 provides that the net proceeds shall be decreed to the captors when the prize was of superior or equal force to the *vessel or vessels making the capture;* that section 4632 simply brings in vessels within signal distance as entitled to share

but not as part of the capturing force—of "the vessels making the capture." They say that proceeds are "decreed to the captors," and that the vessels within signal distance share with the "captors." This logic is strained and ignores any meaning in the idea of a joint captor or constructive captor, unless he actually takes part in the engagement or shares in stopping the vessel. This view repudiates the significance of being in sight or within signal distance, and brushes aside the necessary import in the statute (sec. 4632) of the condition that vessels entitled to participate in the proceeds must be able to render effective aid. All these ideas justly signify that the presence of the other vessels has essentially contributed to the capture. This is the reason, and the only reason, why they are entitled to share. The last portion of section 4632 shows this thought very clearly. In the case of privateers or vessels not in the Navy only the vessel or vessels making the capture are entitled to share. That term includes only vessels present at and rendering actual assistance in the capture. In the present case the *Indiana* would fairly come even within that test. But the meaning of those clauses is that in the case of vessels of the Navy the old presumption in favor of their readiness to take part and their effectiveness against the foe and for the friend attaches to national vessels, and constitutes them joint captors in the full meaning of that term if within signal distance, even if they did not render actual assistance.

In the case of the *Cherokee* (*supra*) Judge Sprague, who, as has been shown, viewed strictly the subject of

constructive capture, uses the following language to enforce his exclusion of those claiming to share who were merely embarked in a joint enterprise, but were not in any sense within the statute:

> But our legislature having provided that one class of those who had been decreed constructive captors shall be entitled to share, and thus given them an express statute right, if the court shall introduce another class of constructive captors, and hold that they are "ships making the prize" within the meaning of the statute, then the result which has already been stated will follow. This, as we have seen, Congress could not have intended. The first class of grantees, therefore, can embrace only actual captors; and this conclusion is in accordance with the fair and natural import of the language of the statute.

The phrase quoted by Judge Sprague, "ships making the prize," is taken from the act of 1862 (sec. 3, par. 4), and is the equivalent of the language of section 4630, "the vessel or vessels making the capture."

It is clear that while Judge Sprague holds that the second class of constructive captors, by association merely, are not entitled to share, he views the first class of constructive captors, namely, those within signal distance, as part of the ships making the prize; and when he says that the first class of grantees can embrace only actual captors, he by no means intends to imply that they are the only ships making the prize.

But in the case of the *Atlanta* (2 Spr., 251) this question was considered further, and doctrines laid down as

applicable to the particular circumstances of that case, which will be invoked here by the captors. The question in that case, as stated clearly in the original syllabus (see note 1 to report in Federal Cases, No. 619), was as follows:

> What cooperation constitutes a vessel one of "the vessels making the capture" for the purpose of determining the relative force of the captors and the prize?

The decision is thus stated in the present syllabus:

> A war vessel within signal distance of another making a prize is entitled to share in the prize under 12 Stat., 606, sec. 3 [act of 1862], but is not a part of the "capturing force," within the meaning of section 2, providing that where the capturing force is superior the prize shall be divided equally between the United States and the officers and men making the capture.

The facts were that the Confederate ironclad *Atlanta* went out to attack the United States monitors *Nahant* and *Weehawken*, supposing herself superior to their combined force. When they met, the *Weehawken* turned, followed by the *Nahant*, and both vessels ran toward the *Atlanta*, which had directed her fire wholly against the *Nahant*. The *Weehawken* fired her shots with such effect as to compel surrender. The *Nahant* had reserved her fire for closer range, and at the time of surrender was equally distant with the *Weehawken* from the *Atlanta*. It was held that the *Nahant* was a part of the capturing force, and that together they were superior to the *At-*

lanta, and half the prize should go to the United States. In rendering this judgment the court said that it was given as the result of the special circumstances of the case, without attempting to establish a test for determining who in other circumstances should be deemed actual captors. The part of the decision holding that a war vessel within signal distance is entitled to share but is not a part of the capturing force related to a gunboat present within signal distance. The language of the opinion as to the gunboat is as follows:

> It is admitted by the officers of both monitors that the gunboat *Cimmerone* was all the while within signal distance and acting under the orders of the senior officer, and consequently entitled to participate in the distribution as being "within signal distance of the vessel or vessels making the prize." The only question as to her is whether she is to be counted in as part of the capturing force—that is, whether she is to be deemed one of the vessels making the capture, within the meaning of the statute, when we are comparing the force of the captors with that of the prize for the purpose of determining whether the proceeds belong wholly to the captors or are to be divided between them and the Government. * * * I have no difficulty, therefore, in deciding that I must exclude the *Cimmerone* in determining the relative force of the captors and the prize. In like manner I exclude the gunboats of the rebels, which were within signal distance of the *Atlanta*, but kept aloof.

I submit that it is improper to draw any general inference from the court's words on this point in the case of the *Atlanta* and apply them to the very different case now presented. For in the latter case the gunboat was in all senses a helpless spectator of the engagement, as were the Confederate gunboats. They "kept aloof." The *Cimmerone* could not have coped with the *Atlanta*, and even as aiding its stronger consorts, would have done a foolish and fatal thing if it had challenged a shot from the Confederate ironclad. It was not present in a condition to render effective aid, which is the present test of the law and contemplates that all such vessels participate in the capture as well as share in the proceeds of the prize. At that time the gunboat was entitled to share, although not fit to participate in the capture, because the act of 1862 did not include the condition of being able to render effective aid. In the present case, with this new test in the law restricting the right to share, we are dealing with ironclads of our Navy within sight or within signal distance of the actual captor and the prize, one of them hurrying to render the aid which she was effective to give and which turned out to be actually necessary. I contend that the distinction between the capturing vessel or vessels of section 4630 and vessels within signal distance of section 4632, drawn from the circumstances of the *Atlanta* case, should not be applied to the present facts and constitute a fixed rule of prize law.

In this court (*The Ironclad Atlanta*, 3 Wall., 425) the decision was that it is proper to consider as the

capturing force not only the flagship leading, actually firing and by her firing doing the only damage, but also any other vessel which by an obviously great force, by its conduct and plain purpose to come at once into the engagement, may have hastened the surrender. This statement controls in principle the case in hand. The entire meaning of the *Atlanta* case is epitomized in the words of the commanding officer: "The first shot took away the desire to fight, the second the ability to get away." Naturally, the consort being eager to join and prevented only by the sudden completeness of the victory, the court held that she had in contemplation of law taken part in the capture In the state of public feeling at the time the United States did not present any opposing argument in this court, her counsel withdrawing from the court room. The captors' counsel asked the very question which will be asked in the different circumstances of this case: "Will it be said that the presence of other vessels has a great moral influence on the result (even if these other vessels do not take an active part), by discouraging the one side and encouraging the other?" The circumstances there were most unlike the present case, and yet the principle to be applied here is clearly indicated in the opinion of the court:

> The mere fact that the only shot fired and the only damage done was by the *Weehawken* is not decisive. Other circumstances must be taken into account in determining the matter, such as the force, position, conduct, and intention of the *Nahant*. * * * It can hardly

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be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the *Atlanta*.

The point as to the gunboat, unable to enter this battle of giants, was not raised or considered in this court. Surely a particular conclusion, natural in the special facts then presented and unchallenged, can not rule this situation, in which the strong vessels of the group were at hand, one of them hastening to complete if necessary the subjugation of a noncombatant merchantman, and actually aiding not only by its presence in force but by the supply of a prize crew.

We submit that the decree of the court below should be reversed, and judgment be pronounced that the force of the prize was inferior, and that the United States is entitled to a moiety.

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